Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

(7)

No. 92-784

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC. AND FRED W. SELLERS, JR.,

Petitioners,

v.

NANCY FELDMAN AND KIM LITTLE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF FOR RESPONDENTS FELDMAN AND LITTLE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction to review the judgment of the Oklahoma Supreme Court invalidating the initiative petition because it was based on an adequate and independent state ground.

2. Whether the First Amendment requires Oklahoma to submit facially unconstitutional initiative petition proposals to a vote of the people.

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OPINION BELOW

The opinion of the Oklahoma Supreme Court (Pet. App. 1a – 52a) is not yet reported.

JURISDICTION

The judgment of the Oklahoma Supreme Court was entered on August 4, 1992. The petition for writ of certiorari was filed on October 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. This case concerns an initiative petition to restrict abortion in Oklahoma circulated by petitioners. The Oklahoma statutes governing the initiative petition process provide that a proponent of an initiative first must file a copy of the proposed initiative petition with the Secretary of State and then has a ninety day period within which to circulate the petition for signature by registered voters. OKLA. STAT. tit. 34, § 8. The petition circulated must be accompanied by the complete initiative measure proposed and also must include "a simple statement of the gist of the proposition." OKLA. STAT. tit. 34, § 3. Upon completion of the circulation period, the proponent must file the signed copies of the petition with the Secretary of State. OKLA. STAT. tit. 34 § 8. If the initiative has the required number of presumptively valid signatures,[1] notice is published and any citizen may file a protest within ten days. *Id.* A protest may be filed to the signature count or to the sufficiency of the petition. *Id.* The Oklahoma Supreme Court hears the protests and then "shall decide whether such petition be in form as required by the statutes." *Id.*

2. On June 29, 1990, petitioners filed their proposed Initiative Petition No. 349 with the Secretary of State (Pet. App. 109a – 120a). On December 17, 1990, the Oklahoma Supreme Court issued an order for notice to be published to begin the ten day period for filing protests to Initiative

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[1] The Oklahoma Constitution, art. 5 § 2, provides that the initiative requires the signatures of eight (8) percent of the total number of votes cast at the last general election for the State office receiving the highest number of votes at such an election.

Petition No. 349 (Pet. App. 106a – 108a). Respondents, Nancy Feldman and Kim Little, two citizens of the State of Oklahoma, filed a protest to the legal sufficiency of the initiative petition on December 31, 1990 (Pet. App. 95a – 105a).

3. On July 14, 1992, the Oklahoma Supreme Court issued an order to all parties to the protest of Initiative Petition No. 349 for briefing on the constitutionality of the initiative in light of this Court's decision in *Planned Parenthood v. Casey*, Nos. 91-744, 91-902 (June 29, 1992). (Pet. App. 88a – 89a). On August 4, 1992, the Oklahoma Supreme Court entered judgment that Initiative Petition No. 349 proposed restrictions on abortion in violation of the United States Constitution and ordered the initiative stricken from the ballot (Pet. App. 1a – 52a).

The Oklahoma Supreme Court held that review of the constitutionality of the initiative petition before it was submitted to the voters was required by article 2, section 1 of the Oklahoma Constitution, which limits the right of the initiative to propositions that are "not repugnant to the Constitution of the United States." (Pet. App. 11a). The supreme court also held that review was required to determine if the signers of the initiative had been misled as to the legal effects of the initiative if it were adopted (Pet. App. 11a – 12a).

The Oklahoma Supreme Court interpreted this Court's decision in *Planned Parenthood v. Casey* as reaffirming that the State may not deprive a woman of the right to terminate her pregnancy before viability (Pet.

App. 6a – 7a). The supreme court determined that Initiative Petition No. 349 criminalized and prohibited abortions before viability except in four narrow circumstances. The supreme court held that the provisions of Initiative Petition No. 349 violated a woman's liberty interest as defined in *Casey* and thus was unconstitutional (Pet. App. 7a – 9a).

The supreme court determined that the proponents of Initiative Petition No. 349 had conceded that the initiative was unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973), when the initiative was drafted and circulated, and that if the initiative were adopted by the voters it would be unconstitutional under *Roe* and *Casey* (Pet. App. 9a). The petitioners had conceded that their purpose in circulating the initiative petition was not to amend Oklahoma law but to create a "test case" to attempt to change federal constitutional law (Pet. App. 11a, 14a). The supreme court found that the initiative petition as circulated did not inform prospective signers, whether in the initiative itself or in the ballot title, or gist, that the proposition would be unconstitutional if adopted by the voters (Pet. App. 11a).

The supreme court rejected petitioners' claimed First Amendment right to have an unconstitutional initiative placed on the ballot for the purpose of creating a "test case." (Pet. App. 12a – 13a). The supreme court reaffirmed its obligation to enforce the Oklahoma Constitutional provision limiting the right of the initiative to proposed changes in Oklahoma constitutional or statutory law (Id.). The supreme court held that pre-submission review of proposed initiatives for constitutionality served the important state interest in preserving the

integrity of the initiative process. Submitting to the voters an initiative that would be unconstitutional if adopted would delude the voters into believing that "their votes on matters of public concern count" when in fact their votes would be "ultimately meaningless acts in an elaborate charade." (Pet. App. 15a). Moreover, the failure of Initiative Petition No. 349 to inform voters that it proposed unconstitutional restrictions on abortion could have misled those who "may support state-imposed limitations on abortions, but who are not inclined to vote for an unconstitutional measure." (Pet. App. 11a). Because voters might be especially reluctant to support an unconstitutional measure, the vote on such an initiative cannot be considered a "meaningful vote" on the proposed measure (Pet. App. 15a). The supreme court concluded that the integrity of the initiative process would be threatened by submission of the unconstitutional initiative petition to a vote. Rather than voting on an initiative measure that could become law, the voters would be engaged in "an expensive, non-binding public opinion poll." (Pet. App. 16a).

ARGUMENT

This Court lacks jurisdiction to hear this case because the Oklahoma Supreme Court justified its refusal to submit Initiative Petition No. 349 to a vote on an adequate and independent state ground. Moreover, the Oklahoma Supreme Court correctly held that its pre-submission constitutionality review of initiative proposals and its refusal to submit unconstitutional initiative proposals to a vote of the people constitute reasonable, non-discriminatory

restrictions upon the First and Fourteenth Amendment Rights of voters that are justified by the State's important regulatory interests. *See Burdick v. Takushi*, No. 91-535 (June 8, 1992), slip op. 5. Oklahoma conducts its pre-submission constitutionality review by analyzing the legal effects, not the subject matter, message or ideas, of the initiative proposals. The interests Oklahoma protects by its pre-submission constitutionality review are compelling, while the burdens the review imposes on the First and Fourteenth Amendment rights of voters and sponsors of initiative petitions, if any, are modest. Applying this Court's standard adopted in *Burdick v. Takushi*, slip op. 4-6, Oklahoma's pre-submission constitutional review does not impose an unconstitutional burden on Oklahoma voters' First and Fourteenth Amendment rights. The Oklahoma Supreme Court's decision below was correct and not in conflict with any decision of this Court. Review by this Court is unwarranted.

1. This Court lacks jurisdiction to hear this case because the Oklahoma Supreme Court justified its refusal to submit Initiative Petition No. 349 to a vote of the people on an adequate and independent state ground. The Oklahoma Supreme Court held that Initiative Petition No. 349 failed completely to inform prospective signers that its proposals to criminalize most abortions in Oklahoma were unconstitutional and that its sole legal effect would be to create a test case challenging the vitality of *Roe v. Wade*. Thus, even if this Court were to find that it is impermissible under the First Amendment to deny voters the opportunity to vote on facially unconstitutional initiative petititon proposals, petitioners here would not be entitled to a vote because they failed to

inform prospective signers of the true legal effect of Initiative Petition No. 349. Under these circumstances, this Court lacks jurisdiction because its constitutional holding cannot affect the ultimate outcome of the case below. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

Oklahoma has constitutionally and legislatively imposed on the Oklahoma Supreme Court the duty to review the initiative to see that the petition as circulated actually reflected the signers' intent. The Constitution commands that "Laws shall be provided to prevent corruption in making, procuring, and submitting initiative and referendum petitions." OKLA. CONST., art. 5, § 8. One such statutory safeguard requires initiative petitions to contain a "simple statement of the gist of the proposition." Okla. Stat., tit. 34, § 3.[2] This statement "must be brief, descriptive of the effect of the proposition, not deceiving but informative and revealing of the design and purpose of the petition." *In re Initiative Petition No. 344*, 797 P.2d 326, 330 (Okla. 1990).

In this case, petitioners admitted in their July 24, 1992, brief to the Oklahoma Supreme Court that "State Question 642 was intended to be, remains now, and shall be, if passed, a test case." (Pet. App. 58a). As drafted and circulated, Initiative Petition No. 349 did not contain a single sentence informing potential signers that its design, purpose and intended effect was to create a test

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[2] This provision has been deemed "essential to guard against fraud, corruption or deception in the initiative and referendum process. . . . " *In re Initiative No. 344*, 797 P.2d at 330 (Okla. 1990); *Community Gas and Service Co. v. Walbaum*, 404 P.2d 1014, 1016 (Okla. 1965).

case of the continuing viability of *Roe v. Wade* (Pet. App. 109a – 120a). The Oklahoma Supreme Court determined that neither the initiative petition itself nor the ballot title accompanying it informed prospective signers that the proposal was unconstitutional (Pet. App. 11a). Thus, the Oklahoma Supreme Court concluded that this failure to inform signers of the fact that the proposed initiative would be unconstitutional was deceptive (Pet. App. 11a). The supreme court was especially concerned that signers of the petition who supported restrictions on abortion but would not support unconstitutional restrictions could have been deceived (*id.*). The Oklahoma Supreme Court's ruling on this matter is consistent with the court's past practices concerning deceptively worded initiative petitions.[3]

2. The Oklahoma Supreme Court has since 1975 examined initiative and referendum proposals to determine if they meet the substantive requirements of Oklahoma's Constitution and the Constitution of the United

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[3] The Oklahoma Supreme Court has invalidated initiatives when the "gist" failed to mention important provisions of the petition such as that the initiative would abrogate the fellow-servant doctrine, that foreign corporations would no longer be prohibited from exercising the power of eminent domain, and that the prohibition against corporations influencing elections by making contributions would be removed. *In re Initiative Petition No. 342*, 797 P.2d 331, 333-334 (Okla. 1990). The Oklahoma Supreme Court invalidated an initiative when the gist informed the signers of only eight of the twenty-five changes the initiative would make in the Oklahoma Constitution that would increase the power of the Governor. *In re Initiative Petition No. 344*, 797 P.2d 326, 330 (Okla. 1990).

States. *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma,* 534 P.2d 3 (Okla. 1975). Petitioners contend that by denying voters the right to vote on facially unconstitutional initiative petition proposals, Oklahoma discriminates among initiative petitions on the basis of content, ideas or messages.

It is certainly true that the Oklahoma Supreme Court denies ballot access to initiative proposals that would, if approved by the voters, violate the constitutional rights of its citizens. But, the basis of this denial is the legal effects the initiative proposals would produce and the impacts these legal effects would have on the lives of Oklahoma citizens and on the integrity of Oklahoma elections and law. In the instant case, the Oklahoma Supreme Court did not in any way concern itself with either the subject matter of the initiative petition or the ideas and messages it reflected (Pet. App. 13a – 14a). Proposals that will not violate the constitutional rights of Oklahoma citizens or impair the integrity of Oklahoma elections and law will be submitted to a vote of the people no matter how controversial are their subject matters or the nature of their ideas and messages. It therefore cannot be said that Oklahoma's pre-submission constitutionality reviews produce impacts on speech or expression as a result of the content-based regulation condemned by the First Amendment. *See United States v. O'Brien,* 391 U.S. 367, 377 (1968).

3. Oklahoma's pre-submission constitutionality review of initiative proposals is a reasonable regulatory tool that serves important and compelling state interests. First, pre-submission review insures that the initiative process cannot be used to infringe the rights of Oklahoma

citizens to be free from state government action and state laws that are inconsistent with the guarantees of the Constitution of the United States.[4] Certainly, this interest cannot be protected unless the Oklahoma State Supreme Court conducts pre-submission constitutionality review of initiative proposals, for without the review, unconstitutional proposals might be approved by a vote of the people, thereby jeopardizing the federal constitutional rights of many Oklahoma citizens. These unfortunate citizens would not be able to vindicate their rights without enduring burdensome, even ruinous legal proceedings that often arise from the state's futile efforts to enforce unconstitutional laws.[5] As the Oklahoma Supreme Court

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[4] This interest was so important to the Framers of Oklahoma's Constitution that they proposed and gained ratification for a constitutional provision requiring that initiative proposals conform to constitutional commands of the nation. It provides:

> All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it; *Provided, such change be not repugnant to the Constitution of the United States.* (Emphasis added).

OKLA. CONST., art. 2, § 1.

[5] It is important to note here that this Court has recognized the right of the states to allow their citizens to bring in state courts federal constitutional challenges to the validity of laws and governmental action under circumstances where such challenges could not be maintained in federal courts because of Article III justiciability requirements. See, *Asarco v. Kadish*, 490 U.S. 605, 617 (1988). Should this Court invalidate Oklahoma's pre-submission constitutionality reviews of initiative petition proposals, it would in effect deny states their rights to deter-

observed, petitioners' First Amendment challenge to pre-submission constitutionality reviews "is, in effect, an argument that their 'free speech' rights to advocate an unconstitutional law outweigh constitutional rights of all other Oklahomans that the Oklahoma Constitution should not be repugnant to the Constitution which we all share as Americans." (Pet. App. 12a – 13a).

It is self-evident that no one is entitled to have unconstitutional laws enacted and preserved. Oklahoma's pre-submission constitutionality review merely hastens the time when its citizens receive their constitutional rights to be protected from unconstitutional laws. If this Court disturbs the method by which Oklahoma has chosen to protect its citizens from unconstitutional enactments, it will be "impos[ing] federal standing requirements on [Oklahoma's Supreme Court] whenever [it] adjudicate[s] issues of federal [constitutional] law, if those judgments are to be conclusive on the parties." *Asarco v. Kadish*, 490 U.S. at 620. "That result . . . would be contrary to established traditions and to our prior decisions recognizing that the state courts are not bound by Article III and yet have it within both their power and their proper role to render binding judgments on issues of federal law, subject only to review by this Court." *Id.*

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mine for themselves when matters are justiciable in state courts simply because the initiative process is involved. Such a ruling would amount to a requirement that states stand idly by as a misguided electorate chooses to violate the constitutional rights of their fellow citizens in a manner that allocates risks of constitutional harm more to the victims than to the perpetrators.

4. Oklahoma's pre-submission constitutionality review is a politically neutral procedure that protects the integrity of its initiative process by preserving the meaningfulness of elections. Just as states can legitimately regulate the number of candidates on the ballot to avoid voter confusion and "frustration of the democratic election process at the general election", *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), Oklahoma can legitimately regulate the initiative process by limiting its use to measures that could become law if approved by the voters. The Oklahoma Supreme Court has determined that deferring a ruling on "transparently unconstitutional [initiative] proposals" until after they are approved by the voters is detrimental to the initiative process in that "citizens may be led to believe that their votes on matters of intense public concern count, when this Court is already fully aware that the proposed measure is subject to being struck down within months should the voters approve it." (Pet. App. 15a). Thus, the initiative process will be "subject to the perception by the citizens . . . that their votes . . . are ultimately meaningless acts in an elaborate charade." (*id.*).

A second aspect of the integrity of the initiative process addressed by the Oklahoma Supreme Court concerns the right of prospective signers of initiative petitions to be given information sufficient to inform them accurately of the effects of the measure. This Court has "repeatedly upheld reasonable politically neutral regulations that have the effect of channeling expressive activity at the polls." *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986). States must have the power to substantially regulate elections "if they are to be fair and honest

and of some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

As discussed above, the Oklahoma Supreme Court determined that neither the initiative petition itself nor the ballot title accompanying it informed prospective signers that the proposal was unconstitutional (Pet. App. 11a). Thus, the Oklahoma Supreme Court concluded that this failure to inform signers of the fact that the proposed initiative would be unconstitutional was deceptive (Pet. App. 11a). The supreme court was especially concerned that signers of the petition who supported restrictions on abortion but would not support unconstitutional restrictions could have been deceived (*id.*).

A third aspect of the integrity of the initiative process addressed by the Oklahoma Supreme Court concerns the rights of voters who may support the overall intent and direction of specific initiative proposals but are not willing to accomplish their goals by unconstitutional means. Such voters face a dilemma: No matter how they vote, they will be forced to send a message contrary to their true beliefs. Either they vote yes, signalling incorrectly that they support unconstitutional action, or they vote no, signalling incorrectly that they do not support the general aims and direction implicit in the initiative proposals. In the end, as the Oklahoma Supreme Court noted, "the vote on an indisputably unconstitutional measure will almost certainly be distorted by widespread citizen awareness of the invalidity of the measure . . . [so that] a truly meaningful vote on the initiative becomes impossible." (Pet. App. 15a). Moreover, these citizens' rights would be further imperilled by initiative elections on unconstitutional

measures because Oklahoma significantly increases the number of signatures sponsors of an initiative must secure if it is being circulated within three years after a substantially identical measure has been defeated in an inititative election.[6] This increased burden may be insurmountable even though the measure defeated becomes constitutional thereafter by virtue of a change in case law or a constitutional amendment.

5. This Court has consistently held that the right to vote in any manner and the right to associate for political purposes through the ballot are not absolute. *Burdick v. Takushi*, slip op. 4; *Munro v. Socialist Workers Party*, 479 U.S. at 193. The burdens Oklahoma's pre-submission constitutionality review of initiative petitions impose on initiative sponsors' and voters' First and Fourteenth Amendment rights, if any, are modest. Oklahoma's pre-submission review does not involve discrimination against intiative proposals on the basis of its subject matter, messages, and ideas, but is a reasonable regulatory tool for insuring the integrity of Oklahoma's initiative process.

a. Petitioners allege that Oklahoma's pre-submission constitutionality review of initiative petitions

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[6] OKLA. CONST., art. 5, § 6 provides: "Any measure rejected by the people, through the powers of the initiative and referendum, cannot be again proposed by the initiative within three years thereafter by less than twenty-five per centum of the legal voters." This significantly increases the burden of initiative supporters, because otherwise they would only have to get valid signatures of eight per centum of the legal voters for legislative measures and fifteen per centum of legal voters for proposals to amend the state's constitution. OKLA. CONST., art. 5, § 2.

deprive initiative sponsors and voters of their ability to launch test cases challenging the continuing vitality of this Court's current constitutional precedents. Oklahoma's pre-submission constitutionality review of initiative petitions not only does not impede anyone's ability to raise test cases through the initiative process, but in fact insures that a test case can reach this Court whenever it results in the measure being denied a vote of the people.

In the first place, Oklahoma's pre-submission review of intiative petitions does not deny anyone access to the initiative process as a means of expressing his or her political ideas. The Oklahoma Supreme Court made clear that "[n]othing in this opinion should be read to limit the content of any petition circulated." (Pet. App. 13a). Anyone may circulate indisputably unconstitutional initiative petitions and circulators are free to use the signature gathering process as a forum for political speech. As a consequence, neither the facts nor the holding of *Meyer v. Grant*, 486 U.S. 414 (1988), relied on by petitioners, are applicable to this case.

Secondly, whenever the Oklahoma Supreme Court finds that an initiative petition contains proposals that violate the Constitution of the United States, and therefore refuses to submit it to a vote of the people, it has taken action that guarantees the petition's sponsors an opportunity to bring a test case to this Court. Under Oklahoma law, sponsors of initiative petitions are entitled to have them submitted to a vote of the people if they meet all legal requirements, including surviving challenges based on federal constitutional grounds. The excluded petition's sponsors will have suffered a direct,

specific, and concrete injury (denial of a vote) as a result of the Oklahoma Supreme Court's incorrect interpretation of federal constitutional law. Moreover, a ruling by this Court correcting the errors of the Oklahoma Supreme Court would redress the sponsors' injuries. *Asarco v. Kadish*, 490 U.S. at 617-624.

Finally, there would be in existence a case or controversy. The petition's sponsors will be seeking to vindicate their right to a vote on valid initiative. Those permitted by Oklahoma to challenge the legal sufficiency of initiative petitions will be seeking to preserve their right under Oklahoma law not to be subjected to an election involving transparently unconstitutional initiative proposals. Under such circumstances, "the proceedings [would be] judicial in nature, and result[ ] in a final judgment altering tangible legal rights." *Asarco*, 490 U.S. at 619.

b. Petitioners also assert that pre-submission review impedes their ability to express their opposition to this Court's current constitutional precedents by campaigning and voting in an initiative election. However, the First Amendment does not require Oklahoma to provide a state-wide vote on petitioners' unconstitutional initiative, even though petitioners may consider such a vote the preferred method of disseminating their statement of protest against this Court's interpretation of the United States Constitution.

In *Burdick v. Takushi* this Court upheld Hawaii's prohibition of write-in votes as a legitimate regulation of the election process even though it prevented the petitioner from expressing his message of political protest at the voting booth. This Court held that to require states to

permit their election system to be used for a "more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Burdick*, slip op. 9-10 (citing *Storer v. Brown*, 415 U.S. at 730). As the Oklahoma Supreme Court correctly held, Oklahoma is not constitutionally required to conduct "an expensive, non-binding public opinion poll." (Pet. App. 16a).

In *Burdick*, this Court also focused on alternative means for expressing the "message" that might be lost by a denial of ballot access to show that the ultimate impact on the petitioner of Hawaii's ballot access regulations were minimal and outweighed by Hawaii's legitimate interests served by the ballot access regulation in question. *Id.*, at 6-10. Sponsors of unconstitutional initiative proposals have a myriad of options for getting out their message of protest to the constitutional status quo. These include:

- Circulating unconstitutional initiative petitions so that their message of protest can be disseminated through the signature challenge process and so that a test case can be launched;

- Circulating constitutional initiative petitions that concern the subject matter of the offending constitutional principle and contain provisions that could reduce the scope of the offending constitutional principle so that an initiative election can be held that will supply the sponsors with a broader forum for their message of protest;

- Participating in the lobbying efforts required to convince Congress and state legislatures to

propose, consider and ratify constitutional amendments;

- Participating in Presidential and Congressional elections in a manner that makes the willingness of candidates to support constitutional amendments or the appointment of Supreme Court justices willing to overturn offending case precedent a visible campaign issue.

It is important to note that two of these options involve access to the ballot as a means of getting out the message of protest that otherwise will not be delivered if unconstitutional initiative proposals are denied a vote of the people. This is consistent with the identification in *Burdick* of ballot access options for the petitioners' message of generalized protest. *Burdick*, slip op. 6-10.

If Oklahoma is forced to abandon its pre-submission constitutionality review of initiative petitions, several compelling state interests that can be protected adequately only by such review will be jeopardized. Moreover, forcing the Oklahoma Supreme Court to delay the timing of deliberations designed to protect the constitutional rights of Oklahoma citizens will destroy its right under our federalist system to be free from federal justiciability standards as it exercises its concurrent jurisdiction over federal constitutional questions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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November 1992